

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF COMMERCE

In the Matter of the Cosmetology
License of Debra Lynn Brown and
Cosmetology Salon License of
Studio 175, Inc.

**RECOMMENDED RULING
REGARDING CROSS MOTIONS
FOR SUMMARY DISPOSITION**

This matter is pending before Administrative Law Judge Barbara L. Neilson on cross motions for summary disposition filed by the Department and Studio 175. Stephen K. Warch, Assistant Attorney General, 445 Minnesota Street, Suite 1200, St. Paul, Minnesota 55101-2130, appeared on behalf of the Minnesota Department of Commerce ("the Department"). Larry Alexander, 175 N. Lexington Parkway, St. Paul, Minnesota 55104, a co-owner of Respondent Studio 175, Inc., appeared on behalf of Respondent, Studio 175, Inc. ("Studio 175"), without benefit of counsel. Deborah H. Mande, Tilton & Rosenbaum, P.L.L.P., 2220 Firststar Center, 101 East Fifth Street, St. Paul, Minnesota 55101-1808, appeared on behalf of Debra Lynn Brown. During the pendency of the motions, Debra Lynn Brown settled with the Department and is no longer a party to this matter. The record with respect to the cross motions closed on February 13, 1998.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61, the final decision of the Commissioner of Commerce shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Order, if any, shall be filed with David Gruenes, Commissioner of Commerce, 133 East Seventh Street, St. Paul, Minnesota 55101.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RESPECTFULLY RECOMMENDED that:

1. The Motion for Summary Disposition filed by Studio 175, Inc., be denied;
2. The Motion for Summary Disposition filed by the Department be granted and the hearing in this matter be canceled; and
3. Appropriate disciplinary action be taken against the cosmetology salon license of Studio 175, Inc.

Dated: March 13, 1998.

BARBARA L. NEILSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Summary disposition is the administrative equivalent of summary judgment. Minn. R. 1400.5500 (K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. A genuine issue is one that is not a sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W. 2d 804, 808 (Minn. App. 1984).

To successfully resist a motion for summary disposition, the nonmoving party must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). The nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party. See Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Dollander v. Rochester State Hospital, 362 N.W.2d 386, 389 (Minn. App. 1985).

Based upon the pleadings and affidavits submitted in this matter, and construing the facts in the light most favorable to the Licensee, the underlying facts in this matter appear to be as follows.

Studio 175, Inc., is a Minnesota corporation. During the time relevant to this proceeding, Larry Alexander was the president of Studio 175, Inc. Affidavit of Larry Alexander dated Feb. 5, 1998. Mr. Alexander apparently owns the property located at 175 North Lexington Parkway in St. Paul, where the Studio 175 beauty salon is located. See Supplemental Affidavit of Larry Alexander dated Feb. 3, 1998, Ex. D at 4.

Debra Lynn Brown, who holds a cosmetology manager's license, entered into a business relationship with Mr. Alexander in 1996. Mr. Alexander suggested that the property he owned at 175 North Lexington Parkway was ideal for a hair salon and suggested that they establish a Minnesota corporation to do business as Studio 175 at this site. Ms. Brown obtained an application from the state to obtain a salon license for Studio 175. She filled out the first page of the Cosmetology Salon License Application and signed the form on the second page. Affidavit of Debra Brown (attached to Ms. Brown's Memorandum in Opposition to Motion for Summary Disposition).

All cosmetology salon license applications submitted to the Department require signatures from building code and zoning officials which verify that the salon meets the minimum standards of the Minnesota State Building Code and has been approved by the local zoning commission. Affidavit of Diane Healey, Ex. A. This requirement stems from Minn. Rules part 2542.0310, subp. 2(D), which provides that corporations proposing to establish a cosmetology salon must "apply in writing to the department, on forms supplied by the department, giving . . . evidence of the salon's compliance with local zoning requirements, local building codes and ordinances, and the rules of the Minnesota Department of Health and the State Fire Marshal if no local fire codes exist." At the time that Ms. Brown signed the application for Studio 175's license, the building code inspection and zoning approval sections were blank. Mr. Alexander volunteered to have that part completed by the appropriate city officials and then drop off the completed form at the Department of Commerce. Ms. Brown was not with Mr. Alexander when he took the form to the City of Saint Paul. Affidavit of Debra Brown.

At some point during the summer of 1996, Mr. Alexander appeared in the office of Wendy Lane, the Zoning Manager for the City of St. Paul, and requested that she approve the application on behalf of the Saint Paul zoning authority. Ms. Lane declined to give Mr. Alexander approval because the property did not meet zoning requirements for the operation of a commercial cosmetology salon. Affidavit of Wendy Lane (attached to Department's Memorandum of Law in Support of Motion for Summary Disposition).

For purposes of these motions, the Department has stipulated that Mr. Alexander filed the license application with the Department on July 10, 1996. Department's Memorandum in Opposition to Cross Motion at 4. At the time that the license application was filed, the building code inspection and zoning approval sections of the application contained illegible signatures and an illegible designation of the positions

held. See Affidavit of Diane Healey, Attachment A. The lines below the signatures calling for the individual to print or type his or her name were not completed. Both approvals bore the date 7-10-96. Id. From the face of the application, it appears that a provisional salon license was granted by the Department on July 30, 1996, and that the application was processed on August 2, 1996. Id.

On August 27, 1996, a Department investigator received a telephone call from Philip Owens, a Supervisor in the St. Paul Fire Marshal's Office advising her that a cosmetology salon license application might be submitted to the Department by or on behalf of Mr. Alexander containing signatures that were not, in fact, provided by St. Paul zoning or building code officials. Mr. Owens informed the investigator that Mr. Alexander had been to the city offices to obtain the proper signatures on his salon application and that the City had refused to give them until the premises were in compliance. He suggested that the Department contact the Fire Marshal's office for verification of signatures before issuing a salon license. Affidavit of Karen Herman, attached to the Department's Memorandum in Support of Motion for Summary Disposition. The Department investigator ascertained that such an application had already been submitted by Studio 175 and that a license had already been issued on July 30, 1996. Id. City building and zoning officials informed the investigator that they had not signed the application and that they did not recognize the signatures. Id.

On December 3, 1997, the Department issued a Notice of and Order for Hearing and Notice of Prehearing Conference seeking to take adverse action against the cosmetology manager license of Debra Brown and the cosmetology salon license of Studio 175, Inc. In the Notice of and Order for Hearing, the Department alleged as one of the grounds for the discipline sought by the Department that "false, misleading, or incomplete information" had been submitted in the license application in violation of Minn. Stat. § 45.027, subd. 7(3)(1996).

In its Motion for Summary Disposition, the Department asserts that there are no facts in dispute and that the undisputed facts show that false information was submitted in the form of falsified signatures of zoning and building code inspection approval. In response, Studio 175 argues that the statute cited by the Department as the basis for this matter was not in effect at the time the license application was filed. Studio 175 maintains that the statute cannot be applied prior to its adoption and, therefore, that this disciplinary action must be dismissed. Studio 175 also contends that there are genuine issues of material fact regarding whether the signatures were in fact falsified, whether a former employee of the zoning or building code offices or someone without proper authority signed the application, whether the signatures were submitted to intentionally mislead the Commissioner, and whether the signatures were "mistakenly proffered." Affidavit of Larry Alexander dated Jan. 22, 1998, ¶ 18. Studio 175 also asserts that the Department's claims are "moot" because various alleged code violations involving the property were rescinded by the City in late August, 1996, and that the property was rezoned in August, 1997, to B-2, which permits the operation of a beauty salon.

The Commissioner of Commerce is charged by Minn. Stat. § 115A.04, subd. 1, with the duty to administer the statute and rules governing cosmetologists. Licensing of

cosmetology practitioners is required by Minn. Stat. § 115A.07, subd. 1. The Commissioner of Commerce is authorized to impose discipline under Minn. Stat. § 45.027, subd. 7, which states in pertinent part as follows:

Subd. 7. **Actions against licensees.** In addition to any other actions authorized by this section, the commissioner may, by order, deny, suspend, or revoke the authority or license of a person subject to the duties and responsibilities entrusted to the commissioner, as described under section 45.011, subdivision 4, or censure that person if the commissioner finds that:

- (1) the order is in the public interest; and
- (2) the person has violated any law, rule, or order related to the duties and responsibilities entrusted to the commissioner; or
- (3) the person has provided false, misleading, or incomplete information to the commissioner or has refused to allow a reasonable inspection of records or premises; or
- (4) the person has engaged in an act or practice, whether or not the act or practice directly involves the business for which the person is licensed or authorized, which demonstrates that the applicant or licensee is untrustworthy, financially irresponsible, or otherwise incompetent or unqualified to act under the authority or license granted by the commissioner.

* * *

Studio 175 maintains that this statute was not adopted before the provisional license was issued on July 30, 1996. This argument apparently is restricted to subdivision 7(4), which is also cited in the Notice of and Order for Hearing as a basis for the Department's proposal to discipline Studio 175's license. Subdivision 7(4) was, in fact, first enacted in 1996. See Laws 1996, ch. 439, art. 1, § 4.

The Department has, however, based its motion for summary disposition solely on subdivision 7(3). The Department pointed out in its responsive brief that this subdivision was originally enacted in 1994 and has remained in the statute without change since that time. That is, in fact, the case. Accordingly, Studio 175 was, in fact, under a statutory obligation to provide accurate information to the Department at the time the application was filed, and Studio 175's argument to the contrary is without merit.

Studio 175 also alleges that the existence of proper zoning after August, 1997, and the St. Paul City Council's decision in late August, 1996, to set aside code deficiencies that had earlier been issued with respect to the property mitigates against a finding that it has violated Minn. Stat. § 45.027, subd. 7(3). In essence, Studio 175 argues that it is irrelevant whether there were falsified signatures on the application,

because the location eventually received a zoning designation that permits the operation of a beauty salon and because the St. Paul City Council rescinded the code deficiencies that had previously been issued. Thus, Studio 175 would have been entitled, in its view, to obtain the appropriate approvals in any event.

The Administrative Law Judge does not find Studio 175's argument to be persuasive. The obligation placed on a licensee by Minn. Stat. § 45.027, subd. 7(3), to provide accurate information to the Department is absolute, not conditional. The license application properly demands certification, at the time the application is submitted, that the premises for which the license is sought complies with the building code and that the zoning for the location is proper for the licensed use. The mere fact that these zoning and code clearances may possibly have been obtained at some point in the future does not provide a defense to a charge that signatures on the Studio's application form had been falsified. Later actions by other public bodies simply have no bearing on whether or not signatures appearing on an application form are accurate.

The Department has submitted affidavits from all the employees who could have properly signed the application. None of those employees signed the application or recognized the signatures that are on the application. Studio 175 argues that the Department has not shown the absence of an issue of material fact because some other person could have signed the application. Studio 175 has misstated the burden the Department must meet to support an order of summary disposition. The Department has shown that the signatures on the application form are not those of any person who is authorized in the normal course of business to sign such application forms. The burden then shifts to the nonmoving party to show that some issue of fact does exist. Studio 175 has not provided an affidavit disputing the assertions in Ms. Brown's affidavit that the zoning and building code inspection sections of the form were blank at the time she gave the application form to Mr. Alexander, Mr. Alexander agreed to take care of obtaining the required signatures, and she never saw the application form again until the Department's investigation commenced. Since Mr. Alexander apparently was in control of the license application form from the time of Ms. Brown's signature to the time it was filed with the Department, it is his obligation, on behalf of Studio 175, to bring forward some facts to support the claim that the application was properly endorsed by persons having actual or apparent authority to approve zoning and code-related applications. This obligation has not been satisfied. As noted above, the party opposing a motion for summary disposition must present specific evidence demonstrating that a material issue of fact remains for hearing. It is not sufficient to raise a "metaphysical doubt" as to an alleged fact issue or merely offer unsupported speculation. See, e.g., St. Paul Fire & Marine Insurance Co. v. Metropolitan Urology Clinic, 537 N.W.2d 297, 300 (Minn. App. 1995).

Studio 175 asserts that Counts I and II of the Notice of and Order for Hearing are deficient because "they are premised exclusively upon the conduct of Debra Lynn Brown, not any actions of Respondent." Reply Memorandum at 1. This argument also is not persuasive. Counts I and II of the Notice of and Order for Hearing clearly assert that the submission of false information to the Department subjects the cosmetology salon license of Studio 175, Inc., to discipline. Moreover, because motions for summary

disposition may properly rely on information outside the formal pleadings, such as affidavit evidence, depositions, and responses to discovery, the parties are not required to rely solely on the allegations set forth in the Notice of and Order for Hearing when they move for summary disposition. Thus, even if the Department does not now assert that it was Ms. Brown who falsified the application form or submitted the false information to the Department, it is still evident, based on the facts presented in connection with the cross motions, that Studio 175's application did, in fact, contain false information and that discipline of Studio 175's license may thus be warranted. Studio 175 failed to provide affidavits or other competent evidence in support of any contention that the falsified application was submitted by Ms. Brown or some other person who was not acting as an authorized agent for Studio 175. Under these circumstances, there has been no showing that it is somehow inappropriate to hold Studio 175 responsible for the misconduct that has been shown by the Department.

Studio 175 argues that the Department is obligated to prove an intent to mislead. Even assuming, *arguendo*, that that assertion is true, the Department has shown by the presentation of undisputed facts that Mr. Alexander filed an application bearing falsified signatures after his request for such signatures was denied by the appropriate authorities. The Department is not obligated to show anything further to demonstrate an intent to mislead.

Relying solely on the facts not disputed by Studio 175, and viewing them in a light most favorable to Studio 175, the Administrative Law Judge is compelled to conclude that the Department has demonstrated that Studio 175's application form contained false and misleading information. The Department has further demonstrated that no genuine issue of fact remain for hearing on the imposition of discipline. The Department is entitled to the entry of summary disposition in its favor.

B.L.N.